

**Question Presented**

Does the Commission's *Policy Statement* Unlawfully Restrict the Right of Listeners to Be Heard on the Public Interest Benefits of Unique Radio Formats?

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IN THE  
**Supreme Court of the United States**  
October Term, 1979

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FEDERAL COMMUNICATIONS COMMISSION  
AND UNITED STATES OF AMERICA,

*Petitioners,*

-v.-

WNCN LISTENERS GUILD, INC. ET AL.,

*Respondents.*

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF AMICUS CURIAE SUBMITTED ON  
BEHALF OF THE AMERICAN SYMPHONY  
ORCHESTRA, AMERICAN SYMPHONY  
ORCHESTRA LEAGUE, AMERICAN INTER-  
NATIONAL ARTISTS LEAGUE, APPLE HILL  
CHAMBER PLAYERS, ASSOCIATION OF  
CONNECTICUT ORCHESTRAS, BOSTON  
BLUEGRASS UNION, BOSTON SYMPHONY  
ORCHESTRA & BERKSHIRE FESTIVAL,  
THE CANTICUM NOVUM SINGERS, CARNEGIE  
HALL CORPORATION, CENTRAL CITY OPERA  
HOUSE ASSOCIATION, CHAMBER MUSIC  
SOCIETY OF LINCOLN CENTER,  
CONNECTICUT ADVOCATES FOR THE ARTS,  
DALLAS CIVIC OPERA, THE DESSOFF  
CHOIRS, EMERSON STRING QUARTET,  
GREENWICH PHILHARMONIA ORCHESTRA,

**HOUSTON GRAND OPERA, JAZZ COALITION,  
INC., JAZZMOBILE INC., KNOXVILLE  
SYMPHONY ORCHESTRA, KODALY CENTER  
OF AMERICA, LINCOLN CENTER FOR THE  
PERFORMING ARTS, LIVING FOLK RECORDS  
AND CONCERTS, INC., LOS ANGELES  
MOZART ORCHESTRA, LOS ANGELES  
PHILHARMONIC ASSOCIATION &  
HOLLYWOOD BOWL SUMMER FESTIVAL,  
METROPOLITAN OPERA ASSOCIATION,  
MUSIC ASSOCIATES OF ASPEN, INC.,  
NANTUCKET MUSICAL ARTS SOCIETY,  
NEW ORLEANS JAZZ CLUB OF NORTHERN  
CALIFORNIA, NEW YORK CHORAL SOCIETY,  
NEW YORK CITY OPERA, NEW YORK  
PHILHARMONIC, OPERA COMPANY OF  
BOSTON, OPERA NEW ENGLAND, ORATORIO  
SOCIETY OF NEW YORK, PHILADELPHIA  
ORCHESTRA, PHILADELPHIA STRING  
QUARTET, ROBIN HOOD DELL CONCERTS,  
INC., ROUNDER RECORDS, ST. CECELIA  
CHORUS, SALT LAKE MORMON TABERNACLE  
CHOIR, SAN DIEGO SYMPHONY ORCHESTRA,  
SAN FRANCISCO SYMPHONY ORCHESTRA,  
SANTA FE CHAMBER MUSIC FESTIVAL,  
SEATTLE OPERA ASSOCIATION & PACIFIC  
NORTHWEST WAGNER FESTIVAL,  
SKYLIGHT COMIC OPERA LTD,  
UNIVERSAL JAZZ COALITION**

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### **Interest of Amici**

Amici are a large group of disparate musical-arts organizations who share in common a passion for the preservation and growth of musical forms, which are among the most important components of America's cultural heritage. They range from the most prestigious and influential classical music organizations in this country and in the world (e.g., Lincoln Center for the Performing Arts, the Metropolitan Opera, Carnegie Hall Corporation, New York, the Los Angeles Philharmonic, the Philadelphia Orchestra, and the Salt Lake Mormon Tabernacle Choir) to small groups of performers (e.g., Apple Hill Chamber Players, Nantucket Musical Arts Society) to associations for the promotion and preservation of peculiarly American music (e.g., Boston Bluegrass Coalition, New Orleans Jazz Club of Northern California).

Whether, like the Houston Grand Opera, they reach listeners and viewers in the millions,<sup>1</sup> or, like the Jazzmobile, play in the streets and the parks for largely economically disadvantaged audiences,<sup>2</sup> they depend on radio as a major means not only of publicizing their performances, but as a way of reaching out to people who have little or no previous contact with, or knowledge of, music outside the commercial, popular sphere. Radio is a major means of audience

<sup>1</sup>During a single season, the Houston Grand Opera has audiences of 3 million attending 358 performances. An additional 10-12 million radio listeners hear weekly performances over a 300-station national network.

<sup>2</sup>Jazzmobile, a sixteen year old New York organization, produces free outdoor summer concerts in many New York neighborhoods and conducts jazz education workshops.

building for diverse kinds of music,<sup>3</sup> groups of musicians,<sup>4</sup> and individual careers.<sup>5</sup> Audiences are necessary to the survival of many forms and varieties of music which might otherwise be lost or forgotten, immeasurably impoverishing our traditions and our lives.<sup>6</sup> And audience building, for these and similar organizations, is a two-way street. Hearing opera, bluegrass, symphonic music or jazz on the radio not only encourages people to attend live performances, with all the attendant benefits to society which that provides,<sup>7</sup> it also provides a singular and unduplicatable source of such music for persons who, for many

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For example, Chamber Music America credits classical music stations for expanding the number of people attending chamber music concerts and estimates that the audience for chamber music is now some 8,000,000 people. Living Folk Records and Concerts, Inc. believes that without the support of radio stations that play folk music and interview performers much of this fine tradition would be lost to the public.

The Greenwich Philharmonia Orchestra, for example, has found that when people listen to music on the radio, they begin to go to concerts, and music becomes part of their lives.

American International Artists, a classical musician management organization, has found that without classical music stations, classical musicians lose access to the listeners which musicians in other fields almost automatically have over the radio. The Universal Jazz Coalition has found the same to be true of jazz musicians.

Audience building is also frequently a prerequisite to that government financial aid which guarantees the survival of many musical organizations. The National Endowment for the Arts, for example, frequently looks to see whether particular organizations are able through radio broadcasts to reach greater audiences than those actually attending performances as a prerequisite of funding grants.

Music supports the general economy rather than depletes it. In New York City, the arts generate \$4.5 billion a year in expenditures and receipts through such peripheral business as hotels, restaurants, shopping and other activities. *New York Times*, April 1, 1980, p. 31. Music is a major tourist attraction in many cities.

Concert halls and musical centers have had profound impacts on the neighborhoods in which they are located. For example, property values in the Lincoln Center area have risen dramatically since it was opened in 1962. Amicus Connecticut Advocates for the Arts, a non-profit lobbying organization, estimates that every dollar spent in the arts returns 2.5 dollars to the community.

reasons, including age, disability or poverty, cannot attend live performances.<sup>8</sup>

In a more uplifting analogy to the way that popular entertainment formats are "bait" to obtain audiences for advertisers, specialized music and arts formats provide a means for reaching a particular audience which wants to know about coming cultural events, concerts, hear and preview new recordings, etc.<sup>9</sup> Where the specialty station is the only one of its kind - i.e., where it offers a *unique* format - its disappearance may deprive those organizations of their most effective, if not their only means of communication with their audiences and admirers,<sup>10</sup> creating a ripple effect with public interest implications far beyond even the loss of the format itself.

All of the amici want and need to use radio to communicate their various but enormously significant messages. All have "messages," whether aesthetic or informational, or both, of high value to listeners and to society as a whole. None, however, are licensees of broadcast stations - not because they eschew such a role, but because no licenses are available where they are located. The spectrum scarcity rationale

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<sup>3</sup>See, for example, two very moving letters, one from an elderly retired couple, one from a recuperating patient in a mental hospital, which were attached as Exhibits to the Comments of the WNCN Listeners Guild in the Inquiry below. Joint Appendix in the D.C. Circuit, pp. 226, 227. These provided limited but eloquent testimony to the virtually life-and-death importance that the access to good music has for many disadvantaged Americans.

<sup>4</sup>For example, the Boston Bluegrass Union depended upon the country music format of Cambridge Station WCOP to reach and build an audience for its beloved bluegrass music and the non-profit concerts it promoted in the Boston area.

<sup>5</sup>This is why a number of these cultural organizations have been involved in struggles to save unique formats. For example, the Association of Connecticut Orchestras supported the citizens group to save WTIC-FM, Connecticut's only classical music station; the Boston Bluegrass Union supported WCOP; and the New Orleans Jazz Club of Northern California fought to save San Francisco's Big Band radio station KMPX.

for public interest regulation of the broadcast spectrum is here made concrete. Many who wish to "speak" may not, except by the sufferance of those few who, by virtue of their licenses, would monopolize the air-waves but for the public interest standard of the Act.

For all of these, the reasons discussed *infra* and in the brief of the Respondents,<sup>11</sup> amici urge this Court to affirm the decision below requiring the FCC to follow statutorily required procedures, enforce the trusteeship concept, and regulate in the public interest, especially where the loss of a unique format is at stake.

Descriptions of the amici follow, in alphabetical order:

The American Symphony Orchestra, founded in 1962 by Leopold Stokowski, is the only major ensemble in the United States which is governed by the musicians themselves; it is a major musical resource which serves a wide range of audiences in the New York area, in part by performing free concerts in parks and community areas.

American Symphony Orchestra League is an organization which lobbies for and represents the professional interests of over 770 orchestras in the United States.

American International Artists is a concert artist management organization which seeks to promote the highest quality in classical music performance.

Apple Hill Chamber Players is a performing ensemble of nine permanent members who live and work at Apple Hill Farm in Nelson, New Hampshire; they perform 100 concerts a year throughout the United States and encourage the participation and enjoyment of amateur musicians at every skill level.

The Association of Connecticut Orchestras is a non-profit association of 22 orchestras, 8 youth orchestras plus other performing groups and individuals; its purpose is to encourage, promote and mutually assist the development and needs of orchestras throughout the state.

The Boston Bluegrass Union is devoted to the promotion and preservation of traditional and modern bluegrass music and presents approximately seven concerts a year in the Boston area.

The Boston Symphony Orchestra is the second oldest symphony orchestra in the United States. The Berkshire Festival, the Orchestra's summer home in Lenox, Massachusetts, is perhaps the world's finest summer music festival and school. Its extensive recordings and its live concerts are broadcast to millions of listeners across the country.

The Canticum Novum Singers is a choral organization which performs regularly in major New York City concert halls. Their concerts have been broadcast many times and they are particularly aware of the importance of radio to artist and audience.

Carnegie Hall is a presentor of concerts as well as one of the world's foremost platforms for concert attractions. The 1980-81 season will celebrate Carnegie Hall's 90th anniversary as an outstanding cultural institution of national and international stature.

The Central City Opera House Association is a producer of professional opera performances in Central City, Colorado and a prime source of live classical music in that part of the Western United States.

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<sup>11</sup> Amici here adopt by reference all arguments made in the brief of Respondents WNCN Listeners' Guild, Inc., *et al.*

Chamber Music America is a national membership service organization founded in 1977 to advance the interests of chamber music.

The Chamber Music Society of Lincoln Center is the resident chamber music constituent of Lincoln Center. It performs 75 concerts annually in New York and around the country. Hundreds of thousands of radio listeners hear its Sunday afternoon concerts live over Radio Station WNCN-FM.

Connecticut Advocates for the Arts promotes and assists non-profit art organizations in Connecticut through coordinated public action and political education.

The Dallas Civic Opera, which has established a reputation as one of the leading international opera companies, presents operatic performances to the Dallas public.

The Dessoff Choir has played an influential role in broadening the repertory of choral music throughout the United States and Europe by its pioneering performances of works from the Medieval, Renaissance and Baroque periods.

The Emerson Quartet is a group of exceptionally gifted young musicians who have performed throughout the United States and Canada.

The Greenwich Philharmonia Orchestra is a locally based symphony orchestra of 85 professional musicians, drawn principally from Fairfield County, Connecticut and from Westchester County, N.Y. and New York City.

The Houston Grand Opera has 11,400 annual subscribers and during a single season has audiences of 3 million attending 358 performances throughout the United States and Europe. An additional 10-12 million radio listeners hear weekly performances over a 300-station national network of commercial and non-commercial stations.

Jazz Coalition Inc. is a membership organization which works to stimulate a vital jazz scene through service to musicians and the music community of greater Boston. They produce jazz concerts and sponsor educational programs.

Jazzmobile Inc. is a New York organization dedicated to the preservation, propagation and appreciation of jazz. They produce concerts and conduct jazz education workshops.

The Knoxville Symphony Orchestra is classed by the American Symphony Orchestra League as a Metropolitan Orchestra because of its \$400,000.00 budget.

The Kodaly Center of America is an organization designed to deliver the Kodaly concept of music education to teachers, performers and children in public and private institutions throughout the United States.

Lincoln Center for the Performing Arts, Inc. is New York's, and one of the world's, finest performing arts center. Constituent organizations within Lincoln Center include the New York Philharmonic, Metropolitan Opera, Juilliard School, Library and Museum of the Performing Arts, New York City Ballet, New York City Opera, Chamber Music Society of Lincoln Center, and Film Society of Lincoln Center.

Living Folk Records and Concerts Inc. is a non-profit organization that has produced folk music records and promoted folk music concerts in the Boston/Cambridge area for the past ten years.

The Los Angeles Mozart Orchestra is a professional chamber ensemble which was founded in 1974.

The Los Angeles Philharmonic, an orchestra of international reputation, broadcasts its concerts weekly to over 200 radio stations via National Public Radio's satellite system. An October 1978 performance was telecast live by satellite and seen by an audience of 30 million in the United States and Europe.

The Metropolitan Opera, one of the world's premier opera companies, broadcasts its performances to over 10 million listeners on over 300 commercial and non-commercial radio stations in the United States. The Public Broadcasting System telecasts four or five "Live from the Met" programs a season.

Music Associates of Aspen, Inc. sponsors the Aspen Music Festival and Aspen Music School, probably the foremost summer institution for advanced musical study in the world.

The Nantucket Musical Arts Society has for 22 years brought a rich variety of chamber groups and soloists to Nantucket, Massachusetts every July and August. They also run the island's only music school, which trains students from kindergarten through high school.

The New Orleans Jazz Club of Northern California is dedicated to the education, preservation and promotion of traditional jazz. They print a monthly newsletter.

The New York Choral Society is a performing organization with 200 singing members. It presents an annual series of concerts at Carnegie Hall.

The New York City Opera was organized in 1944 to present the highest quality opera to audiences at the lowest possible prices. Radio station WNCN-FM has broadcast 10 live performances over the past two years, and also broadcasts an annual "Operathon" to attract new subscribers.

The New York Philharmonic is the oldest symphonic organization in the United States and has played a leading role in American musical life and development. Weekly radio concerts of the Philharmonic are heard on over 250 commercial and non-commercial radio stations in the U.S. and Canada. The Philharmonic utilizes the facilities of Radio Station WQXR for a yearly fund raising and subscription drive.

The Opera Company of Boston is a cultural institution in the City of Boston and one of the United States' leading opera companies.

Opera New England, an offshoot of the Opera Company of Boston, brings opera to thousands of school children in four New England states. These operas are specially staged for children.

The Oratorio Society of New York, the second oldest musical organization in New York City, is a chorus which has presented many American premieres and commissioned works by distinguished companies.

The Philadelphia Orchestra, until this year under the baton of Maestro Eugene Ormandy, is world renowned not only for its spectacular concerts, but for its many and varied recordings, which have been heard over radio stations across the country and around the world.

The Philadelphia String Quartet, which is in residence at the University of Washington, is world renowned and has toured extensively in Europe, South America and the Far East.

Robin Hood Dell Concerts, Inc. is the summer home of the Philadelphia Orchestra. On its fiftieth anniversary in 1979, President Carter stated that "The Dell has made invaluable contributions to the cultural vitality of the City of Philadelphia and . . . has been a model for the Nation and the world for voluntary partnerships between private citizens and local government."

Rounder Records is a major independent record company, which manufactures and distributes acoustic and folk music records.

The St. Cecilia Chorus has approximately 160 singers and has presented the classic choral repertoire, less familiar works of the masters, and United States and world premieres of more than 58 contemporary works. Many of its performances have been broadcast.

The Salt Lake Mormon Tabernacle Choir broadcast its first choir program in 1929. Today, it is the oldest continuous radio program on national networks, carried by 68 television and 355 radio stations in the United States and Canada. It is carried by shortwave to many parts of the world and more than 800 radio and television stations worldwide release the program weekly.

The San Diego Symphony is California's largest regional orchestra; it provides Southern California with 100 concerts a year.

The San Francisco Symphony serves a community of approximately 450,000 with a permanent subscription list of over 20,000. It is the only major orchestra in Northern California. Broadcasts of its performances are played on 31 radio stations across the U.S.

The Santa Fe Chamber Music Festival presents an ever-increasing range of chamber music to New Mexicans and actively commissions new works. Its concerts now take place not only in Santa Fe, but in Seattle and New York City. The Festival's last two seasons have been broadcast live.

The Seattle Opera Association and Pacific Northwest Wagner Festival is the largest arts organization in the Pacific Northwest. Each year they present a full season of five works, with six performances each, four in the original language and two in English translation. Seattle Opera performances are regularly broadcast to national audiences.

The Skylight Comic Opera presents light opera, operetta, vintage musical comedy, modern opera and works for the musical theatre not generally included in the standard repertory.

The Universal Jazz Coalition assists jazz artists, both established and emerging, with low cost public relations and promotion and with advice on concert production and career guidance. The Coalition produces

concerts, seminars, workshops, conferences and publishes a jazz catalogue, newsletter and monthly calendar.

## POINT I

### **The Policy Statement Unlawfully Restricts the Hearing Rights of Listeners Under Section 309(d) of the Communications Act**

In *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966), it was held that television viewers had standing to file a petition to deny renewal of a television station license under Section 309(d) of the Act and to obtain a hearing on complaints that the station's program service was deficient in various respects which would preclude the necessary finding that renewal would serve the "public interest, convenience and necessity." The Commission did not seek reargument or review of this decision and repeatedly cited it in subsequent decisions. It has been cited at least eight times in opinions of this Court.

Nothing in the opinion or in the Act itself suggests that the Commission may, for reasons of administrative convenience or otherwise, narrow or curtail the right of responsible public groups to question the quality of a station's service or its responsiveness to local needs in a renewal proceeding or any other licensing proceeding requiring a public interest finding. Thus, the narrow question in this case is whether the Commission can properly determine as a result of a general and abstract inquiry that in no conceivable case can any public group ever succeed in demonstrating that a change in radio program formats is contrary to the public interest.

More precisely, because the ultimate burden of proof is on the licensee (See *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969) ), the question is whether all radio program formats are conclusively presumed to be in the public interest without regard to public reaction.<sup>12</sup> No party contends or has ever contended that the Commission should undertake the comprehensive regulation of all radio program formats.

The public interest standard as enacted in 1927 and reenacted in 1934 included as its primary element the provision of a program service which is responsive to a broad spectrum of public tastes, needs and interests. The legislative history indicates that commercial incentives could not be relied upon to provide this kind of service. See, e.g., the statement of Secretary of Commerce Herbert Hoover that "no one can raise a cry of deprivation of free speech if he is compelled to prove that there is something more than naked commercial selfishness in his purpose."<sup>13</sup>

The Federal Radio Commission was formed in March 1927 and immediately began a comprehensive reassignment of the broadcast spectrum giving preferential treatment to stations engaged in general public service and assigning less desirable channels and hours to stations operated by educational institutions, churches, unions and other so-called "propaganda" stations. During this period "Connecticut State College

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<sup>12</sup>Some formats, e.g. religious, are not even tested by the need to sell time to advertisers.

<sup>13</sup>*Proceedings of the Fourth National Radio Conference and Recommendations for Regulation of Radio*. Conference called by Herbert Hoover, November 9-11, 1925, Washington, D.C., G.P.O., 1926, p. 1.

was shifted nine times, another educational station was shifted nine times, two others seven times and four others six times."<sup>14</sup>

At the hearings preceding the 1934 Act, the National Association of Broadcasters advised the House Committee that it was the "manifest duty" of the Radio Commission to examine a licensee's program service in renewal proceedings, and that the provision of programs "concerned with human betterment" was the "principal test" applied by the Commission in making assignments in the previous seven years.<sup>15</sup>

The policy of assuring service to all tastes was explained by the Radio Commission in the *Great Lakes Statement*:

"The entire listening public within the service area of a station, or a group of stations in one community, is entitled to service from that station or stations. If, therefore, all the programs transmitted are intended for, and interesting or valuable to, only a small portion of that public, the rest of the listeners are being discriminated against. This does not mean that every individual is entitled to his exact preference in program items. It does mean, in the opinion of the Commission, that the tastes, needs and desires of all substantial groups among the listening public should be met, in some fair proportion, by a well-rounded program, in which entertainment, consisting of music of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions,

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<sup>14</sup>Herring, E. Pendleton, "Politics and Radio Regulation," *Harvard Business Review*, Vol. 13, No. 2, January 1935, pp. 167-178; Barnouw, Erik, *A Tower in Babel*, New York, Oxford Univ. Press, 1966, p. 260.

<sup>15</sup>Hearings on HR 8301, 73rd Cong., p. 117.

weather, market reports and news and matters of interest to all members of the family find a place."<sup>16</sup>

A number of the most profitable radio stations in the nation are operating on radio frequencies obtained during the 1928-1934 period by promises to provide program service responsive to a wide spectrum of public needs. As the Commission stated in the Blue Book,

"It has long been an established policy of broadcasters themselves and of the Commission that the American system of broadcasting must serve significant minorities among our population, and the less dominant needs and tastes which most listeners have from time to time."

Dr. Frank Stanton of CBS was quoted as testifying:

"It is known that the New York Philharmonic Symphony Orchestra, the Columbia Work Shop, Invitation to Learning, Columbia Broadcasting Symphony and many other ambitious classical programs never reach the largest audience, but Columbia, nonetheless, puts them on year after year for minorities which are growing steadily."<sup>17</sup>

While it is true that the Commission did not order broadcasters to adopt particular formats, the Commission did in 1927-34, and does today, regularly designate meritorious programming issues in renewal proceedings at the request of broadcast applicants.<sup>18</sup>

<sup>16</sup> Fed. Radio Comm. Ann. Rept. at 166 (1928) quoted in Kahn, Frank S., *Documents of American Broadcasting*, 3d ed. at 152 (Prentice-Hall, Englewood Cliffs, N.J.)

<sup>17</sup> *Id.* at 163.

<sup>18</sup> *Medford Broadcasters, Inc.*, 18 F.C.C.2d 817, 818 (1969); *Midwest Radio Television, Inc.*, 18 F.C.C.2d 1011, 1014 (1969).

Many incumbent licensees have relied on the superiority of their program service to defeat competing applicants.<sup>19</sup> The Commission appears to have little difficulty deciding in these cases questions which the *Policy Statement* argues are hopelessly complex. For example, it recently decided that the foreign language programming of Station WHBI-FM in Newark was not "unique" and therefore did not aid the licensee in a meritorious programming issue.<sup>20</sup>

Until recently, the Commission has never indicated that it doubted its responsibility to assure that radio formats contributed to overall diversity of service. Thus, until recently, the Statement of AM or FM Program Service, included in the Commission's license renewal application form,<sup>21</sup> contained these questions:

"17. Describe the applicant's proposed programming format(s), e.g., country and western music, talk, folk music, classical music, foreign language, jazz, standard pops, etc., and the approximate percentage of time per week to be devoted to such format(s).

"18. State how and to what extent (if any) applicant proposes to contribute to the overall diversity of program services available in the area or communities to be served."

The answers to these questions were treated as binding representations for the term of the license. A licensee who proposed to change format in mid-term was required to advise the Commission and justify the change in terms of overall diversity of service. It is true, of course, that these changes pre-

<sup>19</sup> See e.g., *WPIX, Inc.*, 68 F.C.C.2d 381 (1975).

<sup>20</sup> *Cosmopolitan Broadcasting Corp.*, 75 F.C.C.2d 423, 425 (1980). FCC Form 303, Section IV(a).

cipitated little, if any, Commission action, but that is understandable. The Commission has virtually no field staff other than technicians. The Broadcast Bureau in Washington cannot be expected to investigate and judge the responsiveness of program service to local needs without the aid of concerned parties. Thus it was not until the *United Church* case that such issues were taken up in the context of license renewal and transfer proceedings. When the unique format issue arose in *Atlanta*,<sup>21</sup> it was not new. It had been routinely designated in hearings upon application of license applicants. The element that was new was designation at the request of *public groups* and, perhaps, the fear that the Commission's processes would be overborne by a horde of disgruntled devotees of one or another format.

We are brought back to the Court's wise words in *United Church*:

"The fears of regulatory agencies that their processes will be inundated by expansion of standing criteria are rarely borne out." (359 F.2d at 1006.)

Sensitive to the Commission's fear, the Circuit Court has itself erected more severe barriers to public participation in format cases than in others. Thus, it is not enough that an individual or a responsible group be concerned. There must be "significant public grumbling." In the decided cases this has often involved resolutions and statements of legislative bodies and important public officials and wide participation of public groups. Thus the Court has given full weight to

". . . our national tradition that public response is the most reliable test of ideas and performance in broadcasting as in most areas of life[and to] the Commission view . . . that we have traditionally

depended on this public reaction rather than on some form of governmental supervision or 'censorship' mechanism." (*Id.* at 1003.)

The Commission, on the other hand, would designate meritorious programming issues only at the instance of licensees and usually as a shield against license challenges.<sup>24</sup> In the light of the Commission's repeated consideration of meritorious program service during the 1928-1934 period, Congress must have intended that to be embraced within the public interest standard. It could not have contemplated that meritorious programming be included in the public interest standard at the sole option of the licensee. Any such interpretation would deprive listeners of their rights as parties in interest under Section 309(d).

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In *Deregulation of Radio*, Docket No. 79-219, *Notice of Inquiry and Proposed Rulemaking*, released September 27, 1979, the Commission has proposed that consideration of programming be barred in renewal proceedings, except as follows:

"Under an alternative proposal arising with respect to comparative renewal proceedings, an incumbent licensee might be allowed to voluntarily ask for Commission consideration of its nonentertainment programming *or* of its entertainment programming as a basis for finding that the licensee's past service is sufficiently meritorious to overcome a challenger's advantages on other grounds. In considering this alternative proposal, we again want to emphasize that our fundamental goal is service to the public. The courts have recognized that both nonentertainment programming<sup>25</sup> and entertainment programming<sup>26</sup> can meet public needs."

<sup>21</sup>E.G. *Office of Communication of United Church of Christ v. FCC*, 359 F.2d at 994.

<sup>22</sup>E.G. *Cosmopolitan Broadcasting Corp. v. FCC*, 581 F.2d 917, 931 (D.C. Cir. 1978)."

## POINT II

### The Policy Will Unlawfully Preclude the Commission from Taking a "Hard Look" at First Amendment Claims by Public Intervenors

This Court has noted that:

"It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."<sup>24</sup>

The Court has also made clear that the listener's First Amendment rights are not limited to public questions or even to speech but include significant cultural expression:

"It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." (*Id.*)

Moreover, the decision holds that this balance can be compelled even when no one will pay for the time.

Thus format petitions by public groups present clear First Amendment claims. They involve directly the ultimate First Amendment objective of culturally diverse service. Public parties seeking to present these claims are the persons whose rights to cultural diversity are in jeopardy.

The conditions which public intervenors must meet to establish materiality under Section 309(d) of the Act as interpreted by the Court of Appeals (i.e. proof of uniqueness, public demand and commercial

viability) are restrictive, and few cases are likely to arise, much less go to hearing.<sup>25</sup>

To obtain a hearing, public intervenors would be compelled to show that the prediction upon which the Commission's new policy is based (i.e., that commercial incentives will usually serve all significant minority tastes) has failed in practice. Thus the interpretation of 309(d) adopted by the Court of Appeals can be viewed as simply a specialized application of the hard look doctrine outlined in *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

In that case, a daytime station in Chicago sought a waiver of the FCC's clear channel rule which prohibited it from operating at night. It alleged that its programming of "good" music and forum discussions on matters of public interest was a unique AM service and that its night time signal would be directionalized and would not interfere with the clear channel signals in the sparsely populated "white" areas which the clear channel stations were intended to serve. The Commission rejected the request for waiver on the sole ground that its rule would be violated. The Court conceded that, "An applicant for waiver faces a high hurdle even at the starting gate." But it noted that "the agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances." The Court did not think it necessary to consider to what extent the overbreadth principle of First Amendment cases enlarged the Commission's

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<sup>24</sup> We know of only one hearing in a format case resulting from a public petition to deny, and none which went to a final decision by the Commission. Often the controversy over loss of a valued format produces such an outpouring of loyalty and advertiser interest that the licensee readily agrees to maintain the format on at least a part-time basis or another licensee agrees to serve that program taste.

duty to consider waivers, but it held that "the manifest importance of the subject matter" required a "hard look."<sup>26</sup> *WAIT* has since been followed by the Commission and has been cited in more than 50 decisions.

Unless the Commission's new policy is more absolute than a formal rule, the very grounds which required a hearing in *WAIT* would require a hearing in format cases, i.e. the *prima facie* showing that a unique and culturally valuable service was at stake and that the presumptions upon which the general rule is based had failed in practice. Under the *Policy Statement* the persons whose First Amendment rights are "paramount", i.e., the listeners who wish to preserve unique, diverse and culturally valuable program services, would be the only parties who could not be heard.

### CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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<sup>26</sup>Upon remand the Commission considered the application on its merits and found sufficient dangers to the public interest in the proposed waiver to justify denial. The Court affirmed.